

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

The Application for Certification
for the CITY OF RIVERSIDE PUBLIC
UTILITIES RIVERSIDE ENERGY
RESOURCE CENTER

Docket No. 04-SPPE-1

**REPLY BRIEF OF THE
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

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Pursuant to the August 31, 2004 direction of Hearing Officer Fay, the California Unions for Reliable Energy submit this Rely Brief.

I. INTRODUCTION

The Opening Briefs of the Staff and the Applicant seek to entice the Commission to either choose between the differing opinions of experts or to simply ignore the law based on insulting and unsubstantiated claims that CURE's witnesses are "biased." Under the fair argument standard, the Commission can do neither.

The Staff offers detailed, technical explanations of why the disputes should be resolved in their favor. The Staff asks the Commission to give greater weight to staff's opinion because they have expressed that opinion in other cases. But the Staff is just one party to this proceeding. The Staff assumes its (presumably expert) opinion is indisputable gospel that negates

any possibility of differing opinions. Even though Staff relies only on its past practice, while CURE's experts rely on the California Air Resources Board and the South Coast Air Quality Management District standards to establish a fair argument, Staff would have the Commission take its side in the dispute. Again, under the fair argument standard, the Commission cannot choose sides.

Were the Commission making a decision on the merits of the Project, it would be both entitled and required to sift through the competing opinions to determine which experts were more persuasive (and we are confident it would find in favor of the opinions of CURE's experts). The Commission would weigh the competing evidence and the qualifications of the witnesses to decide which is more credible (and we are confident that CURE has presented better analysis with better qualified witnesses).

But in this case, the Commission knows better. It knows that the fair argument standard is a low threshold. It knows that parties cannot introduce new evidence and testimony in its briefs (though we are confident that the new rebuttal testimony and exhibits in Staff's Opening Brief are plagued by mistakes). It knows that when a party cannot overcome the message, it will attack the messenger.

The Commission also cannot conclude that this SPPE proceeding has been "just as a good as an AFC." The Commission need only look at its long history of interacting with other permitting agencies, and substantially

changing or adding to their requirements, to see that an AFC is not a Pro Forma exercise.

Most importantly, the Commission knows that it cannot conclude that there is **no** substantial evidence in the record that supports a fair argument that a significant impact may result from this Project.

II. THE COMMISSION HAS A VERY NARROW TASK

This proceeding is not a decision on the merits of the Project. It is not a decision on whether any particular impact will or will not occur if the Project is approved. It is only a decision on whether EIR-level review must be performed. That question is answered by determining only if “it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.” (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) As the Commission itself articulated,

we must require AFC level review if there is any substantial evidence in the record which supports a fair argument that the MEGS project may have a significant effect upon the environment. In applying the fair argument standard, ***our task is not to weigh competing evidence*** and determine which is more persuasive, but rather to determine whether substantial evidence exists in the record to support the prescribed fair argument. If such evidence is found, ***it cannot be overcome by substantial evidence to the contrary.***

(Modesto Irrigation District Electric Generating Station Small Power Plant Exemption Decision And Mitigated Negative Declaration, 03-SPPE-1, February 2004, pp. 6-7, emphasis added, footnotes omitted.)

Staff acknowledges that an EIR “must be prepared whenever substantial evidence in the record supports a ‘fair argument’ that significant impacts may occur, *even if other substantial evidence shows that impacts will not occur.*”¹ Staff attempts to open a loophole in this legal standard, claiming that its testimony that there will not be significant impacts means that CURE’s testimony is not “substantial evidence.” If simply presenting conflicting testimony were enough to overcome the fair argument standard, that standard would be meaningless.

Neither CEQA nor the CEQA Guidelines allow this purported loophole to swallow the fair argument test. Instead, the statute provides the specific legal test for finding substantial evidence.

(d) If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.

(e) (1) For the purposes of this section and this division, substantial evidence includes *fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.*

(2) Substantial evidence is not *argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous*, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

(Pub. Resources Code, subds. 21080(d) and (e)(emphasis added).)

All of our evidence of potential significant impacts is “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.” Simply because other witnesses disagree about highly technical

¹ Staff Opening Brief, p. 2.

matters does not mean that CURE's evidence is "argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous."

Neither the Applicant nor Staff has presented any basis for concluding the CURE's evidence is "argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous," much less evidence proving that **all** of CURE's evidence of a dozen significant impacts is **all** "argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous."

Staff repeatedly criticizes CURE's experts for using worst-case scenarios or assumptions that are "unlikely" to support their conclusions of an impact. At times, staff even claims that an impact must be "probable" to satisfy CEQA's fair argument standard. These assertions reflect a fundamental misunderstanding of the "fair argument" standard. The lead agency must prepare an EIR, whenever there is a fair argument of **possible** significant adverse environmental impact. For purposes of CEQA, "[possible] indicates that something is realizable as an end. It can imply either a moderate degree of probability **or the barest chance within the limits of circumstances.**" (*Security Environmental Systems v. South Coast Air Quality Management District*, (1991) 229 Cal.App. 3d 110, 119 (emphasis added).) Therefore, for purposes of finding a "fair argument," under CEQA, the likelihood of the impact is irrelevant.

III. THE APPLICANT'S CLAIMS ABOUT "PROJECT NEED" ARE IRRELEVANT AND CONTRADICTED BY THE RECORD

The Applicant begins its Opening Brief by claiming that failing to grant it an SPPE "would be very adverse" to the citizens of Riverside. These statements should be ignored.

First, the Applicant concedes that "the test for granting a negative declaration should not be based on project need."² Thus, the Applicant's exaggerated rhetoric about the impacts on its citizens and the SPPE process are not relevant.

Second, and perhaps more important, the Applicant's claims are contradicted by the record. There is no longer any possibility that this Project will be operational at the start of the Summer 2005 peak demand period. According to the Applicant, the Project will take nine months to construct.³ Thus, construction cannot be concluded before next Summer, but with an AFC proceeding, could be operational by the Summer of 2006. In addition, the Applicant has shown that only half of the Project capacity will be needed before 2008.⁴ There is no evidence in the record that any extra cost to secure 50 MW of alternative capacity for the Summer of 2005 from other sources exceeds the extra costs that would have been incurred for constructing nearly 50 MW of capacity several years before it was needed. Nor is there any evidence of "massive, and rare in California, community

² Applicant Opening Brief, p. 2.

³ Ex. 12, p. 2-4.

⁴ Ex. 6, Response to CURE Data Request #1, Owner's Engineer Project Meeting Minutes, June 24, 2003, p. 2 of 4.

support”⁵ for this Project. If the City Council’s hearings are any gauge, the community is evenly divided on the question.

A conclusion better supported by the record is that citizens of Riverside are plagued by terrible air pollution and are best served by observing every legal requirement to minimize any increase in air pollution from this Project.

Therefore, the Commission should not give any weight to the unsupported and perhaps inaccurate claims about the need for, benefits of and support for the Project.

IV. THE APPLICANT’S ARTICULATION OF THE “APPLICABLE STANDARD” IS RIDDLED WITH ERRORS

The Applicant attempts to articulate the legal standard applicable to this case. However, nearly everything following its first sentence is incorrect.

The Applicant begins by conceding what the Commission has determined in two prior SPPE cases and announced at the beginning of hearings in Riverside: the fair argument standard applies to this case.⁶ Then, the errors begin.

A. The Applicant is Wrong in Stating that Meeting the Fair Argument is a “Difficult Task”

The Applicant then states that “[a] reading of this standard could lead one to believe that complying with this standard is not a difficult task. This is simply not true.”⁷ The courts have determined otherwise.

⁵ Applicant Opening Brief, p. 3.

⁶ Applicant Opening Brief, p. 3.

⁷ Applicant Opening Brief, p. 3.

CEQA “creates a *low threshold* requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.” (*Sierra Club v. Sonoma* ((1992) 6 Cal. App. 4th 1307 at 1316-1317 (emphasis added); *see also, Oro Fino Gold Mining Corp. v. County of El Dorado*, (1990) 225 Cal.App.3d 872, 881; *No Oil, Inc. v. City of Los Angeles*, (1974) 13 Cal.3d 68, 84; *Sundstrom v. County of Mendocino*, (1988) 202 Cal.App.3d 296, 309-310.) Of course, Commissioner Geesman observed, this is “breathtakingly low standard.”⁸

B. CURE Did Not Rely on “Incorrect Facts”

The Applicant states that substantial evidence cannot be based on incomplete or incorrect facts. Then, as its only example of an incorrect fact, the Applicant makes the astonishing statement that “[o]ne example of relying on incorrect facts is CURE’s claim that the project construction emissions will violate the 24-hour California Ambient Air Quality Standard (‘CAAQS’) at the fence line, without considering background levels.”⁹ According to the Applicant’s own modeling and the Staff’s testimony, the project would add 97.6 µg/m³ of PM₁₀ to the ambient air, averaged over a 24-hour period.¹⁰ This is almost double the CAAQS for 24-hour PM₁₀ of 50 µg/m³.¹¹ What is the incorrect fact?

⁸ Transcript for the July 28, 2004 Prehearing Conference, p. 62.

⁹ Applicant Opening Brief, p. 3.

¹⁰ Ex. 15, p. 4-14, Table 19, note f.

¹¹ Ex. 12, p. 4-6, Table 1.

Providing no hint of what could be incorrect with a fact that the Applicant itself provided and is uncontested in the record, the Applicant then claims that CURE's testimony is "incomplete" because, it claims, our experts failed to inform the Commission that the Commission and the SCAQMD do not evaluate projects by looking at the CAAQS.¹² This is simply wrong. The California CEQA Guidelines and the Staff's own testimony state that an impact is significant if it will "violate any air quality standard [such as the CAAQS] or contribute substantially to an existing or projected air quality violation."¹³ What is unusual in this case is that the Project would violate the 24 hour PM₁₀ standard all by itself. There is nothing "incomplete" with identifying this unusually severe impact.

C. CURE Witnesses Were Not "Biased"

The Applicant then makes the inflammatory and baseless claim that CURE's witnesses were biased.¹⁴

All parties stipulated to the expertise of CURE's witnesses. Their qualifications were so patent, that no party questioned their qualifications or presented any evidence of bias:

HEARING OFFICER FAY: In the interests of time we do have, and have read, the resumes of the witnesses. And you may save us a little time by moving along through that quickly.

MR. JOSEPH: I'm, of course, at your direction. The applicant and staff having said right at the beginning when you identified the legal standard that they're going to focus on claiming that

¹² Applicant Opening Brief, p. 3.

¹³ State CEQA Guidelines, Appen. G; Ex. 15, pp. 4-16.

¹⁴ Applicant Opening Brief, p. 3.

our testimony is argument, speculation or unsubstantiated opinion and narrative, I think it's important to clearly establish for the record precisely the qualifications of these witnesses to give exactly the testimony they're giving.

HEARING OFFICER FAY: Mr. Thompson, will you stipulate to the qualifications of these witnesses to testify on these matters?

MR. THOMPSON: Either that or we can go to lunch while they go through this.

MR. JOSEPH: We won't drag this on forever. I just want to touch on a few points.

HEARING OFFICER FAY: Okay. Is there any question about these people being qualified as experts in the subject?

MS. DeCARLO: None from staff.

HEARING OFFICER FAY: None from staff. None from applicant.

MR. THOMPSON: None.¹⁵

The oral testimony confirmed that the Applicant and Staff were correct to stipulate to the qualifications of CURE's witnesses.

Dr. Fox was the most professionally credentialed and experienced person in the hearing room. The majority of her career has been spent working for industry. Her clients included Union Oil Company, smaller oil companies, Agrium, commercial development firms, and numerous cities, counties, states and agencies.¹⁶ She was cited, by name, as the source of expert opinion on air quality for purposes of CEQA in a recent published

¹⁵ Transcript for the August 31, 2004 Hearing ("Tr. 8/31/04"), pp. 105-106.

¹⁶ Tr. 8/31/04, pp. 110-111.

decision. (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comrs.*, (2001) 91 Cal.App.4th 1344, 1371.)

Dr. Pless has a specialized degree specifically applicable to her testimony – a doctorate in environmental science and engineering from UCLA.¹⁷ This is the same degree held by Dr. Barry Wallerstein, Executive Officer of the SCAQMD.¹⁸

Ms. Sears is simply the leading air quality modeler in the State of California. She “wrote the book” as designer of the computer model used throughout California to assess health impacts from toxic emissions. She has performed over 1,000 modeling analyses. Since 1992, she has provided modeling technical support to the California Air Pollution Control Officers Association, the California Office of Environmental Health Hazard Assessment and the California Attorney General. She has taught courses in the subject.¹⁹ When the agencies in California need accurate advice on air quality modeling, they ask Ms. Sears.

In the face of the overwhelming qualifications of the CURE witnesses, the only support the Applicant provides for its claim of bias is the following:

CURE states “the Applicant’s failure to provide ***emission reduction credits*** required by air district rules violates the state implementation plan and is a significant CEQA impact.” After RERC committed to providing ***those offsets***, CURE then, demonstrating its bias against the Applicant’s project, took the position that the “offset program would not mitigate impacts” (Ex. 25, page 38). This example of continuing to develop new

¹⁷ Ex. 28, Tab B, Tr. 8/31/04, p. 108.

¹⁸ www.aqmd.gov/bios/ms_wallerstein_barry.html

¹⁹ Ex. 26; Tr. 8/31/04, pp. 107-108.

issues as preceding issues are resolved demonstrates CURE's bias and renders their testimony suspect.²⁰

This statement does not demonstrate the bias of CURE's witnesses; it demonstrates only the Applicant's ignorance of SCAQMD rules, terminology and the California State Implementation Plan. CURE has consistently explained since well before the Pre-hearing Conference that the law requires that the Applicant provide Emission Reduction Credits. The Applicant has never committed to provide ***Emission Reduction Credits***. In our Opening Brief, we explained why the air district rules require the Project to provide ***Emission Reduction Credits*** established under SCAQMD rules for PM₁₀ emissions from operating the Project.²¹ Instead of legally valid ERCs, the Applicant relies on a vague program of retrofitting an unknown number of unknown vehicles that will operate at unknown times in unknown locations producing an unknown level of emission offsets. This proposed program is not federally approved and cannot be used as Emission Reduction Credits, which are required by SCAQMD Rule 1303. It is also not adequate CEQA mitigation. CURE's witnesses are not "continuing to develop new issues as preceding issues are resolved" when the issue has ***not*** been resolved and the purported mitigation is provided at the last minute. If this is an example of anything, it is the Applicant grasping at mitigation straws to avoid its specific legal obligations under the SCAQMD Rules and the California State Implementation Plan.

²⁰ Applicant Opening Brief, p. 3 (emphasis added).

²¹ CURE Opening Brief, pp. 33-41.

Moreover, CURE's witnesses were not at all reluctant to acknowledge that when the facts warrant it, they will agree that a significant impact will not occur. Specifically, when the Applicant offered to limit its construction to an 8 hour day, CURE's witnesses readily agreed that, if this were a condition of exemption, it would eliminate the significant 24 hour PM₁₀ impact based on the SCAQMD's Local Significance Threshold test of 10.4 µg/m³.²²

Finally, it is unbecoming of the Applicant to disparage CURE's experts, when it was forced to repeatedly revise its air quality modeling to correct errors identified by these very experts.²³

V. THE FAIR ARGUMENT STANDARD APPLIES TO DETERMINING SIGNIFICANCE THRESHOLDS

Staff explains in its Opening Brief that it has developed its own method for determining whether a project's construction impacts are significant. Staff does not use the air district's significance thresholds or any other quantitative measure.²⁴ Staff is certainly entitled to present its views on whether a particular impact is or is not significant.

However, CEQA does not permit an agency to use Staff's views as an immutable regulatory standard mandating that an impact is not significant in the face of a fair argument that an impact is significant. As explained by a recent case and in our Opening Brief, such a result would improperly allow the lead agency to evade the

²² Tr. 8/31/04, p. 143.

²³ Tr. 8/31/04, p. 35.

²⁴ Staff Opening Brief, p. 4.

duty it would have under the fair argument approach to look at evidence beyond the regulatory standard, or in contravention of the standard, in deciding whether an EIR must be prepared. Under the fair argument approach, **any** substantial evidence supporting a fair argument that a project may have a significant environmental effect would trigger the preparation of an EIR.

(Communities for a Better Environment v. California Resources Agency (“CBE v. CRA”) (2002) 103 Cal. App. 4th 98, 113 (emphasis in original).) As a decision earlier this year phrased it, “a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant.” (*Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 11 Cal.Rptr.3d 104, 111.) Thus, the Staff’s threshold of significance cannot be unilaterally applied to foreclose consideration of CURE’s fair argument based on other thresholds that impacts will be significant.

In our testimony, CURE’s expert witnesses compared the impacts to regulatory standards established by the most expert agencies: the California Air Resources Board and the South Coast Air Quality Management District. CARB is charged by California law to establish ambient air quality standards and the SCAQMD is charged by California law to achieve those standards in the South Coast Air Basin. Expert testimony that an impact is significant because it exceeds the standards set by these agencies is unquestionably “substantial evidence of a fair argument.”

Staff argues that its significance standard considers the unique characteristics of each site.²⁵ The California Ambient Air Quality Standards apply everywhere in California, and the SCAQMD CEQA significance thresholds apply to this site. Neither should be ignored, and they certainly support a fair argument that impacts would be significant.

Neither the Staff nor the Commission itself can simply proclaim that an impact is not significant. The Commission must conduct EIR-level review if any party presents a fair argument of a significant impact. The fact that the Staff or the Commission itself has a different view does not change the Commission's obligation to conduct EIR-level review.

The Applicant argues that since the Commission is the CEQA lead agency, it can determine the environmental significance for its projects or can use an alternate test based on impacts to the nearest sensitive receptor.²⁶

To be clear, we are ***not*** saying that the Energy Commission, as lead agency under CEQA, is bound to apply the standards of another agency when it performs EIR-level review. We are only saying that when determining if EIR-level review must be performed, our testimony provides a fair argument of a significant impact – exactly what the court held in *CBE v. CRA*. It does not matter that other tests may or may not show impacts to be significant.

With these legal standards in mind, we turn to the fair arguments supporting a multitude of significant impacts from this Project.

²⁵ Staff Opening Brief, p. 4.

²⁶ Applicant Opening Brief, pp. 5-6.

VI. THERE IS A FAIR ARGUMENT OF SIGNIFICANT IMPACTS

A. *The Project Would Cause A Violation of the California Ambient Air Quality Standard for 24-hour PM₁₀*

There is no dispute that construction of the Project would add 97.6 $\mu\text{g}/\text{m}^3$ of PM₁₀ to the ambient air, averaged over a 24-hour period.²⁷ This is almost double the CAAQS for 24-hour PM₁₀ of 50 $\mu\text{g}/\text{m}^3$.²⁸

The Staff says that because the CAAQS for PM₁₀ is “already violated,” the Project cannot cause a new violation of this standard, so the only appropriate question is whether the Project’s contribution to the violation is substantial.²⁹ For two reasons, this argument misses the point.

First, the existing background concentration of 164 $\mu\text{g}/\text{m}^3$ is only on the worst day. On all other days, the existing background concentration is less. On some days, the 50 $\mu\text{g}/\text{m}^3$ standard is not violated at all. If construction takes place on one of those days, the Project may **cause** a violation.

Second, even looking only at the impact on the worst-case day, the Project would increase PM₁₀ concentrations by 59%. Dr. Fox testified that this is a substantial contribution to an existing violation.³⁰ On any day on which the standard is currently exceeded, other than the worst-case day, the contribution is even more substantial.

In either case, the impact is significant.

²⁷ Ex. 15, pp. 4-14, Table 19, note f.

²⁸ Ex. 12, pp. 4-6, Table 1.

²⁹ Staff Opening Brief, p. 4.

³⁰ Tr. 8/31/04, pp. 132-133.

Staff claims that the Project will not cause a substantial adverse effect on human beings because there will be a “minor temporary” increase in 24 hour PM₁₀.³¹ CURE’s witnesses and the regulatory agencies disagree. Violating a CAAQS is not “minor,” it is a *per se* significant impact.

Nor is the violation in this case so “temporary” as to be insignificant. The CARB has set the CAAQS based on average exposure over **24 hours** because exposure averaged for that short a time can cause significant adverse impact in humans. Indeed, Staff’s own witness (and Dr. Fox) testified that PM₁₀ has health effects on humans at levels **below** the 24 hour PM₁₀ standard of 50 µg/m³.³² Moreover, both the Applicant’s air quality witness Mr. Lany, and the Staff’s air quality witness Mr. Walters, testified that the impact would occur for a three week period.³³

Staff’s arguments that the area in violation “would not be inhabited for a 24-hour period”³⁴ is probably true but certainly irrelevant. As Ms. Sears explained, all of the exposure needed to create a violation of the 50 µg/m³ 24 hour **average** standard, can happen in very few hours, with the remaining time assumed to be zero exposure.³⁵

Staff may not think a violation of a CAAQS matters much, but expert testimony based on state and local air quality regulations and CEQA

³¹ Staff Opening Brief, p. 5.

³² Tr. 8/31/04, pp. 71, 117. Staff’s new testimony about workplace exposure limits is both improper and irrelevant. The CAAQS are the standard that supports a fair argument of significant impacts.

³³ Tr. 8/31/04, pp. 22, 83.

³⁴ Staff Opening Brief, p. 7.

³⁵ Tr. 8/31/04, pp. 126-127.

guidelines is substantial evidence that it is a significant environmental impact. Dr. Fox testified that, “it is my professional opinion that the increase in 24-hour PM10 from this project would result in a significant air quality impact by exceeding the California 24-hour ambient air quality standards.”³⁶ Ms. Sears agreed, testifying that, “it’s because the project contribution to the 24-hour average PM10 concentrations exceed the standards, by themselves. And that would, by definition, be a significant impact.”³⁷

1. Staff’s reference to other proceedings is improper and inaccurate

Staff’s Opening Brief attempts to introduce new evidence in a table of “Cases with Fence Line or other Maximum Concentrations Predicted Greater than the AAQS or Predicted to Potentially Cause New Violations of AAQS.”³⁸ This table purports to show other cases in which the Staff found there would be no significant impact. However, the record in this case is closed. Moreover, this new table demonstrates only why the Commission requires evidence to be presented in hearings by witnesses, not in briefs by lawyers.

Staff requests administrative notice of the “decisions” listed in the table. The Commission can of course take administrative notice that it made decisions in each of these cases. But the interpretation of the technical facts underlying those decisions is not a proper subject for administrative notice. Those interpretations should have been presented in Staff’s testimony, as it

³⁶ Tr. 8/31/04, p. 131.

³⁷ Tr. 8/31/04, p. 132.

³⁸ Staff Opening Brief, p. 6.

did in Exhibit 15, at page 4-25 for two prior decisions. By making its claimed interpretations as testimony, it enabled CURE to explain why those cases did not support the claims.³⁹

Even if the Commission admitted new evidence, the table does not support Staff's claims. Nothing in the table demonstrates that the PM₁₀ emissions from those projects exceeded CAAQS *after* mitigation measures were imposed, as do the emissions in this case. The Elk Hills and Sunrise cases, for example, imposed more mitigation than assumed in the air quality modeling, and the Elk Hills case mitigated 100% of its construction emissions with emission offsets. Thus, the cases do not support Staff's arguments and should have been the subject of expert testimony.

In addition, Staff admits that all of the estimates in the other cases "were deemed very conservative ... grossly overestimated or other considerations were present."⁴⁰ Again, there is substantial evidence that the estimates in this case were *not* conservative or overestimated.⁴¹

Furthermore, each project has its own unique set of meteorological data that determines the ambient concentrations that result from a particular set of emissions.⁴²

Finally, even if the table stood for everything Staff claimed, it would be legally irrelevant. It does not matter how many times Staff found similar

³⁹ Tr. 8/31/04, pp. 300-302.

⁴⁰ Staff Opening Brief, p. 7.

⁴¹ Tr. 8/31/04, p. 126.

⁴² Tr. 8/31/04, p. 148.

impacts insignificant. *CBE v. CRA* is unequivocal: an agency's pre-existing standard of significance is no excuse to avoid the fair argument standard.

2. Staff's reference to Dr. Fox's work in other proceedings is not in the record and wrong

Staff identifies three cases "known to have active CURE representation by Ms. [sic] Phyllis Fox." These are Elk Hills, Sunrise and Salton Sea.⁴³ Again because Staff presented this new evidence in its Opening Brief rather than as testimony in the hearing, the Commission does not have all the facts. While Staff's new testimony in its brief is wholly outside the record and should be stricken, for the benefit of the Committee, we provide the facts.

In the Elk Hills case, Dr. Fox testified about several air quality issues, but not construction air quality impacts. Staff opposed most of her recommendations. However, the applicant in that case agreed to implement a number of mitigation measures to reduce impacts below what Staff had achieved. Some these measures were subsequently required as mitigation by Staff in other siting cases.

Most notably, Elk Hills was the first project in California to agree to a NO_x emission limit of only 2.0 ppm averaged over 1 hour. This established a new BACT level for all other combined cycle power plants in California. CURE and the developer also agreed to mitigation for construction emissions, water resources, hazardous materials and worker safety that were more

⁴³ Staff Opening Brief, p. 7.

stringent than proposed by Staff. Having achieved the landmark BACT standard and other major mitigation measures that Staff had not achieved, CURE and Dr. Fox did not participate further in the proceeding.

In the Sunrise case, CURE and Dr. Fox participated actively on air quality and other issues, and our testimony was relied in the final Commission Decision. Dr. Fox, for example, testified on the use of oxidizing soot filters to mitigate exhaust emissions from construction equipment, based on her industry experience, and was supported by both vendors and the San Luis Obispo County Air Pollution Control District, where the technology had been previously deployed. Staff opposed CURE's recommendation, but the owner agreed to it. This was the first project licensed by the Commission that required oxidizing soot filters on construction equipment and that requirement was based on CURE's work. Staff has subsequently routinely proposed the use of oxidizing soot filters on construction equipment.

However, before the Commission issued its final decision in the Sunrise case, that applicant changed the project from a combined cycle plant to a simple cycle plant that could be installed to meet demand in the Summer of 2001, eliminating many of the operational issues CURE had raised. The construction mitigation proposed by CURE was included in the final decision. CURE and its member unions worked closely with the developer to construct that project in record time to respond to the energy crisis. CURE and Dr. Fox

did not participate in the evaluation of the operational impacts from the simple cycle version of that project.

In the Salton Sea case, CURE and Dr. Fox expressed concern about the hydrogen sulfide emissions from the project. We attempted to persuade the Staff to propose mitigation measures, but were met with resistance. CURE ultimately agreed with the developer on several measures to mitigate emissions of hydrogen sulfide. Had Staff shown more interest in the issue, perhaps we could have achieved more. Given Staff's failure to insist on more stringent mitigation, it cannot criticize CURE for the level of mitigation we nevertheless managed to achieve.

Thus, the facts of the other cases "with active CURE representation by Ms. Phyllis Fox," do not change the substantial evidence of a fair argument that this Project will cause a violation of the CAAQS for 24 hour PM₁₀.

3. Applicant's arguments based on two other projects are irrelevant

The Applicant argues that "CURE fails to recognize that the Commission does not evaluate projects using the criteria put forward by CURE."⁴⁴ Actually, the Applicant fails to recognize that whatever standards the Commission has used in the past, *CBE v. CRA* and *Protect The Historic Amador Waterways* do not allow the Commission to ignore a fair argument of a significant impact. The Applicant's approach ignores this basic legal principle.

⁴⁴ Applicant Opening Brief, p. 7.

Even if the Commission were able to rely on prior cases, the two cases cited by the Applicant do not support its argument.⁴⁵ In the Kings River case relied on by the Applicant, 24 hour PM₁₀ emissions at the fence line from construction were *less than* 50 µg/m³,⁴⁶ not nearly *double* the CAAQS as in this case. Also unlike this case, Staff added additional mitigation that was *not* included in the modeled results.⁴⁷

The Magnolia case, relied on by the Applicant, was an AFC, not an SPPE case. There was no issue of a fair argument of significant impacts, and even the portion of the decision quoted by the Applicant demonstrates its irrelevance to this case. As the Applicant's Opening Brief quotes, potential impacts in the Magnolia case were "limited to the project site,"⁴⁸ and like Kings River (and unlike this Riverside case), Staff added additional mitigation that was *not* included in the modeled results.⁴⁹

The Applicant also argues that CURE "fails to explain that the point where its modeled concentrations extend beyond the fence line is in an area that contains vacant land and a dead end road."⁵⁰ In fact, CURE's witnesses repeatedly testified about the legally relevant fact – that the public has

⁴⁵ In addition, contrary to Applicant's Opening Brief, CURE was not an active participant in either of the two cases cited.

⁴⁶ 03-SPPE-2, p. 3-22.

⁴⁷ 03-SPPE-2, p. 3-24 ("The applicant's proposed mitigation measures were included in the results of the modeling analysis Staff is proposing additional construction measures to mitigate the potentially significant construction PM₁₀ impacts.").

⁴⁸ Applicant Opening Brief, p. 5.

⁴⁹ 01-AFC-6, p. 114.

⁵⁰ Applicant Opening Brief, p. 7.

access to the area outside the fenced boundary of the property.⁵¹ Ms. Sears testified that,

I've been doing this kind of air quality modeling for over 23 years. And in every case we've always used ambient air as the occurring in the regions outside the property owned by the emission source. In this case it would be the fenceline or beyond in the case of the Riverside Energy Resource Center. And that has been my experience exclusively for the last 23 years that that's how we've dealt with ambient air.⁵²

Dr. Fox testified "[a]mbient air quality standards apply everywhere the public has access to, which, when you're doing an analysis like this, is everywhere outside of the fence boundary of the project."⁵³ Even Mr. Walters admitted that there is nothing in CARB regulations that says that CAAQS apply only where there are sensitive receptors.⁵⁴

This longstanding requirement to assess impacts at the fenceline makes sense. Indeed, the lack of traffic on the road east of the site makes it very easy to picture a parent and a small child parking a car and watching the big machinery move lots of dirt for hours at a time.⁵⁵

B. Emissions from Constructing the Project Will Contribute Substantially to a Violation of the California Ambient Air Quality Standard for 24-hour PM₁₀

There is no dispute that the Project would increase 24 hour PM₁₀ by 97.6 µg/m³, or by 59%.⁵⁶ The Staff also concedes that there will be an "area of

⁵¹ Tr. 8/31/04, pp. 114-115, 130, 184.

⁵² Tr. 8/31/04, p. 114.

⁵³ Tr. 8/31/04, p. 130.

⁵⁴ Tr. 8/31/04, p. 102.

⁵⁵ Tr. 8/31/04, p. 185

⁵⁶ Tr. 8/31/04, p. 133; Walters Suppl. Test. 8/31/04, p. 4-14; Table 19, note f.

exceedance.”⁵⁷ CURE provided expert testimony that increasing pollution in an area that is already more than triple the CAAQS by 59% is a significant impact.⁵⁸ Indeed, a leading CEQA case suggests that **any** increase in a pollutant that is already over the standard is significant.⁵⁹ This testimony creates a fair argument of a significant impact.

Staff offers several reasons to support its opinion that the impact is not significant. Before addressing them, we again note that Staff’s opinion does not negate the fair argument presented by CURE.

Staff offers its opinion that the impacts are not significant because they will be temporary. As we explained in our Opening Brief,⁶⁰ the duration of the impact does not make it insignificant. Here, the impact will last far longer than the **24 hour** average exposure that CARB has determined can cause significant health impacts. The impact also lasts longer than the SCAQMD determined could be significant in its CEQA Air Quality Handbook, when it gives **daily** emission thresholds of significance. In fact, CEQA significance thresholds throughout the State are based on daily thresholds that need only be exceeded once, on the maximum day. The Staff is entitled to its opinion, but CURE’s expert opinions based on CARB and SCAQMD determinations create a fair argument.

⁵⁷ Staff Opening Brief, p. 7.

⁵⁸ Ex. 26; Ex. 25, p. 2; Tr. 8/31/04, pp. 132-134.

⁵⁹ *Kings County Farm Bureau v. City of Hanford*, (1990) 221 Cal.App.3d 692,718.

⁶⁰ CURE Opening Brief, pp. 17-19.

Staff offers its opinion that the impacts are not significant because “[t]here is no evidence in the record that any person will be located in this area for any length of time even approaching 24 hours.”⁶¹ In fact, there is no dispute that the public has access to the affected areas shown on CURE’s figures, and no dispute that even with only 8 hours of construction, the 24 hour average PM₁₀ concentration will increase greatly in areas to which the public has access. Again, the exposure can occur in only a handful of hours yet cause the 24 hour average to substantially increase.

Staff offers its opinion that the modeling of impacts was “very conservative.” Ms. Sears, a renowned air quality modeler, testified that the modeling was *not* necessarily conservative.⁶²

Staff’s brief also provides a table based on the SCAQMD’s Local Significance Threshold.⁶³ Staff claims this supports its opinion that the modeling was conservative. However, the Staff improperly relies on this data. The SCAQMD document from which the Staff obtained the data in its table specifically warned that “[l]arge industrial projects, such as installation of turbines at power plants are beyond the scope of these LST lookup tables.”⁶⁴ Obviously, the experts disagree, and Staff’s opinion is based on air district data that the air district says does not apply to this Project. Even if

⁶¹ Staff Opening Brief, p. 7.

⁶² Tr. 8/31/04, pp. 123-126.

⁶³ Staff Opening Brief, p. 8.

⁶⁴ Ex. 28, Tab D, p. 3-3.

Staff's opinion were valid, it would not negate the fair argument of significant impacts.

Staff also argues that its mitigation measures would ensure that the impacts would be fully mitigated.⁶⁵ We are surprised Staff continues to repeat its claim, since Mr. Walters acknowledged that the Applicant's modeling already assumes that all mitigation is in place⁶⁶ and extraordinarily effective, yet still shows significantly increased PM₁₀ concentrations.

The Applicant offers a rambling and disjointed discussion of the role of a mitigated negative declaration, making the absurd claim that if CURE's significance standard were applied to stationary sources, "no permits to construct a source could be issued by SCAQMD ... without an EIR."⁶⁷ The SCAQMD and other lead agencies in the South Coast Air Basin, routinely use the significance thresholds relied on by CURE to evaluate projects that are subsequently permitted. Some exceed the thresholds after mitigation; some do not. We agree that an EIR is not required if an impact is fully mitigated, but is required when, as here, after implementing all mitigation, a project increases pollutant concentrations by 59% over a level that already violates the CAAQS.⁶⁸

⁶⁵ Staff Opening Brief, p. 9.

⁶⁶ Tr. 8/31/04, p. 61.

⁶⁷ Applicant Opening Brief, p. 9.

⁶⁸ Applicant also provides data it extracted from four other CEC proceedings. (Applicant Opening Brief, p. 10.) This testimony by the Applicant's lawyer is inappropriate and, not surprisingly, wrong. All four examples cited by the Applicant were AFC proceedings. None was an SPPE, hence none considered the fair argument question relevant to this case.

Staff quibbles with the effect on emissions from applying gravel to heavily traveled paths.⁶⁹ However, Staff's claims are misleading and incorrect. First, the Applicant testified that gravel is placed *after* grading.⁷⁰ Second, the COE requires that the gravel be applied *after* some grading.⁷¹ Third, the use of gravel to control haul road emissions was included in PM₁₀ emission estimates.⁷² Fourth, haul roads are a minor source of emissions.⁷³ Fifth, nobody's PM₁₀ emissions considered two factors that would tend to increase PM₁₀ emissions from gravelling – the creation of fines from the weight of heavy construction equipment and the kicking out of fines beneath the gravel.⁷⁴ Thus, nothing about graveling will reduce PM₁₀ emissions from the peak period of grading.⁷⁵

Finally, Staff raises arguments about the CAAQS itself, claiming it has a margin of safety, so exceeding the standard is not necessarily a significant impact.⁷⁶ First, CURE's witnesses disagree.⁷⁷ Dr. Fox testified that PM₁₀ is a "no-threshold" pollutant.⁷⁸ Moreover, the claim in Staff's brief is peculiar. Staff's witness, Will Walters, agreed that California has defined a CAAQS as

⁶⁹ Staff Opening Brief, p. 9.

⁷⁰ Tr. 8/31/04, p. 231.

⁷¹ The Staff's condition AQ-C3(o) requires graveling "after they have been graded."

⁷² Tr. 8/31/04, p. 267.

⁷³ Tr. 8/31/04, p. 200.

⁷⁴ Tr. 8/31/04, p. 267.

⁷⁵ In its argument about the substantial contribution of the project to 24 hour PM₁₀, staff raises arguments about the mapping of the location of the nearest residence. This is an issue related to significant impacts as measured by the SCAQMD's LST, not a contribution to a violation of the CAAQS. Staff also raises arguments related to SCAQMD Rule 1303. This is related to annual, not 24 hour, PM₁₀ impacts.

⁷⁶ Staff Opening Brief, p. 10.

⁷⁷ Tr. 8/31/04, p. 117.

⁷⁸ Tr. 8/31/04, p. 117.

“the maximum amount of a pollutant that can be present in outdoor air without harm to the public’s health,”⁷⁹ and that the 24 hour PM₁₀ standard may not even be stringent enough, testifying that, “I think, in fact, impacts below [the standard] can cause problems with some people.”⁸⁰ In any event, testimony by CURE’s witnesses based on the CAAQS is undeniably substantial evidence of a fair argument that impacts will be significant.

C. Emissions from Constructing the Project Will Cause a Violation of the California Ambient Air Quality Standard for Annual PM₁₀

The CAAQS for ***annual*** PM₁₀ concentrations is 20 µg/m³.⁸¹ The Applicant’s modeling indicates that construction would increase annual PM₁₀ concentrations at the fence line by 4.97 µg/m³.⁸² The existing background PM₁₀ concentration in the vicinity of the project is 63.3 µg/m³.⁸³ Dr. Fox testified that this is a substantial contribution to an existing violation of an ambient air quality standard.⁸⁴ Based on her experience and expertise, this testimony alone creates a fair argument of a significant impact.

According to Dr. Fox and Dr. Pless, a second way to evaluate the significance of an increase in a pollutant that already exceeds an ambient air quality standard is by comparing it to allowable changes in concentrations in

⁷⁹ Tr. 8/31/04, pp. 70-71 (“I believe that’s the way the state has defined the ambient air quality standard.”)

⁸⁰ Tr. 8/31/04, p. 71.

⁸¹ Ex. 15, p. 4-14; Table 19.

⁸² Ex. 15, AQ Table 19, p. 4-14, note f.

⁸³ Ex. 12, FIS, AQ Table 4, p. 4-11.

⁸⁴ Tr. 8/31/04, p. 135.

SCAQMD Rule 1303, Table A-2.⁸⁵ In fact, the Applicant relied on these thresholds in its revised air quality analysis to determine the significance of the increase in annual PM₁₀ concentrations due to construction emissions. However, the Applicant incorrectly applied them only at the nearest sensitive receptor.⁸⁶ CURE's figures show areas that exceed the Rule 1303 threshold of 1 µg/m³ for both the 8 hour and 12 hour construction day.

The Applicant and Staff point to the opinion of Mohsen Nazemi of the SCAQMD, who testified that the SCAQMD does not “recommend” using the Rule 1303 threshold for construction emissions.⁸⁷ However, Dr. Fox testified that she has personally worked on “many” EIRs in which the 1 µg/m³ significance threshold was actually used to evaluate whether or not a project resulted in a substantial contribution to an existing violation of a nonattainment pollutant.⁸⁸ As Dr. Fox explained,

[t]he significance of a change doesn't depend on the source of the emissions. In other words, if the emissions come from a power plant stack or a refinery stack or the exhaust pipe of a scraper doesn't really make any difference. The point is that's the level at which the South Coast has concluded in its rulemaking that a change in air quality would be considered to be substantial.⁸⁹

This is more than enough to support a fair argument based on the SCAQMD's significant change threshold.

⁸⁵ Ex. 25, p. 3.

⁸⁶ Ex 25, Attachment C, p. 2.

⁸⁷ Staff Opening Brief, p. 11; Applicant Opening Brief, pp. 10-11.

⁸⁸ Tr. 8/31/04, p. 136.

⁸⁹ Tr. 8/31/04, p. 137.

D. Emissions from Constructing the Project On a 12-Hour Per Day Schedule Will Contribute Substantially to a Violation of the California Ambient Air Quality Standard for 24-Hour PM₁₀

Under SCAQMD Local Significance Threshold policy and according to the expert opinion of Dr. Fox, an emission increase of 10.4 µg/m³ at the nearest sensitive receptor is significant.⁹⁰ As explained by Dr. Fox in her oral testimony, that policy includes residences in its definition of “sensitive receptor.”⁹¹ Based on a 12-hour per day construction schedule, the project will exceed the LST for 24-hour PM₁₀ emissions during construction at the nearest sensitive receptor.⁹²

However, as Ms. Sears also testified, if the project’s construction schedule were reduced to 8 hours per day, there would not be a significant impact based solely on exceeding the LST at a sensitive receptor. The Applicant has indicated that it would be willing to accept such a condition. Thus, if the CEC places an enforceable limitation on the Project’s construction schedule to 8 hours per day and formally adopts this condition as part of its Project approval, there would not be a significant impact *based solely on the LST*.

It is important to recognize however that this condition would ***not*** eliminate the significant impact based on causing and contributing to a violation of the 24 hour PM₁₀ CAAQS, since even with only 8 hours of

⁹⁰ Tr. 8/31/04, pp. 145-146.

⁹¹ Tr. 8/31/04, pp. 145-146.

⁹² Tr. 8/31/04, pp. 140-141.

construction, the Project would increase offsite ambient PM₁₀ concentrations by 65 µg/m³. Nor would it mitigate the impacts of violating other significance thresholds relied on by CURE's witnesses.

E. NO_x Emissions From Construction are Significant

According to published SCAQMD CEQA Handbook, which provides the air district's only published threshold for construction-related NO_x emissions,⁹³ and according to the expert testimony of Dr. Fox,⁹⁴ NO_x emissions of more than 100 lbs/day from construction of a project is a significant impact. According to the Applicant's estimates and the FIS, construction of the Project will cause an increase in NO_x of 134.9 lbs/day.⁹⁵ This is well over the SCAQMD's 100 lbs/day significance threshold and over the level of emissions that Dr. Fox testified would be significant. Thus, there is a fair argument that construction of the Project will result in significant air quality impacts due to the emissions of NO_x.

Staff and Applicant repeat their arguments that the SCAQMD thresholds are not binding on the CEC.⁹⁶ Again, we do not claim that the SCAQMD CEQA Handbook is binding on the Commission. Rather, when determining if EIR-level review must be performed, our testimony, based partly on the guidelines of the expert agency, partly on many years of experience and partly on the short term nature of the adverse health effects

⁹³ Tr. 8/31/04, pp. 150-151; also see Ex. 28 (written testimony of Drs. Fox and Pless), Tab H, p. 6-4.

⁹⁴ Tr. 8/31/04, pp. 150-151.

⁹⁵ Ex. 15, p. 4-3, air quality table 10.

⁹⁶ Staff Opening Brief, p. 12; Applicant Opening Brief, p. 11.

of ozone, provides a fair argument of a significant impact – exactly what the court held in *CBE v. CRA*.

The Applicant also presents arguments based on the impact of NO_x emissions on **NO₂** concentrations.⁹⁷ These arguments are irrelevant. CURE never made any claim that NO_x emissions were significant because of increased NO₂ concentrations.

The Applicant also argues that modeling ozone formation is not appropriate for individual sources.⁹⁸ This is usually correct, but completely irrelevant. Ozone is a regional problem involving complex atmospheric reactions that are not usually modeled for individual projects. This is exactly why the SCAQMD set the CEQA significance threshold based on **emissions** of 100 pounds per day, rather than on any effect on **ambient concentrations**.

The Staff mentions the short term nature of the construction impacts as a reason they are not, in Staff's opinion, significant. First, of course, this is only Staff's opinion, and CURE does not agree. Second, because the NO_x emissions are from the exhaust from heavy equipment and other construction vehicles, the emissions will continue for longer than will the PM₁₀ emissions from grading. Even after the period of greatest disruption of the surface layer, vehicles will continue to operate and emit NO_x. Third, the SCAQMD set its significance thresholds for construction NO_x emissions on a daily basis.

⁹⁷ Applicant Opening Brief, p. 11. At least Staff knows enough to focus on NO_x as an ozone precursor, not as causing increased NO₂ concentrations.

⁹⁸ Applicant Opening Brief, p. 12.

The SCAQMD CEQA Handbook specifically states with respect to construction emissions: “if emissions on an individual day exceed...100 lbs a day for NO_x..., the project should be considered significant.”⁹⁹ This is because ozone forms daily and ozone AAQS are based on exposures of only 1 hour or 8 hours.¹⁰⁰ Since the adverse health impacts come from short term exposures, there are significant CEQA impacts from short term emissions.

CURE’s testimony is fully adequate to support a fair argument of a significant impact.

F. The Applicant and Staff Underestimated Construction PM₁₀ Emissions

The parties have different opinions about whether the PM₁₀ emissions from construction were underestimated or not. Regardless of whether they are underestimated, they are significant because the emissions estimated by the Applicant are high enough to cause violations of AAQSs and to exceed other significance thresholds, as discussed above.

CURE provided a revised estimate of PM₁₀ emissions. Although we identified three serious errors in the Applicant’s and Staff’s estimates, we considered only two of those in providing our expert opinion of the PM₁₀ emissions. The first of those, emissions from scraper drop operations, is by far the largest correction to the estimate by the Applicant and Staff.

⁹⁹ Ex. 28, Tab H, p. 6-4.

¹⁰⁰ Ex. 12, p. 4-7.

1. **Scraper drop operation emissions were underestimated**

The expert witnesses disagree on the appropriate emission factor for scraper drop operations.

The Applicant and Staff rely on an emission factor from EPA’s AP-42 manual. The emission factor they chose is a “mine-specific” emission factor which is unrelated to anything in Southern California and not even appropriate for all surface mines.¹⁰¹

Dr. Fox, on the other hand, used an emission factor developed by MRI, a consultant under contract to the SCAQMD, specifically for emissions in the South Coast Air Basin from the specific model of scraper the Applicant will use, a Caterpillar 623.¹⁰² She did not use the maximum emission factor for this source, rather she used an intermediate estimate. She has previously used the emission factors from this report when working for Unocal.¹⁰³

Even if it were proper for the Commission to resolve this dispute among experts, the Commission should find that Dr. Fox’s emission factor is more appropriate than the emission factor used by the Applicant and Staff because it is inappropriate to use an emission factor developed for a lignite mine in North Dakota for construction in Riverside.¹⁰⁴ In any event, the

¹⁰¹ Ex. 29, p. 11.9-4, 11.9-11 (“A ‘mine-specific’ emission factor should be used **only** if the characteristics of the mine for which an emissions estimate is needed are very similar to those of the mine for which the emission factor was developed.” (emphasis added).)

¹⁰² Ex. 31, p. 4-7; Tr. 8/31/04, pp. 160-161.

¹⁰³ Tr. 8/31/04, p. 161.

¹⁰⁴ Tr. 8/31/04, pp. 159, 174.

Commission must conclude that Dr. Fox has presented substantial evidence to support her opinion.

Staff presents for the first time in its brief, new testimony critiquing Dr. Fox's use of the emission factor from the MRI report.¹⁰⁵ There is no testimony in the record to support this critique. Staff concludes its critique by saying, "staff believes that the fugitive dust emission method used by the applicant ...would result in a more accurate emission estimate."¹⁰⁶ Even if the Commission were entitled to consider this new testimony, and was entitled to resolve the dispute between experts,¹⁰⁷ it would not change the fact that Dr. Fox's expert opinion is supported by substantial evidence.

The Applicant also presents for the first time in its brief, new testimony critiquing Dr. Fox's use of the emission factor from the MRI report and a new calculation of emissions.¹⁰⁸ There is no testimony in the record to support this critique. On the contrary, Applicant states that "CURE presented a conclusion that *mitigated* emissions from the earth scrapers would be approximately 45 pounds per scraper hour (Tr. 8/31, Page 161)...."¹⁰⁹ This is a complete misrepresentation of Dr. Fox's testimony. In fact, Dr. Fox testified that 45 pounds per scraper hour was the *uncontrolled*

¹⁰⁵ Staff Opening Brief, pp. 18-19.

¹⁰⁶ Staff Opening Brief, p. 19.

¹⁰⁷ Not only is Staff's new testimony in its brief improper, it is wrong. Staff mischaracterizes Dr. Fox's analysis, and clearly does not understand the MRI Report. Dr. Fox, on the other hand, provided her expert opinion based on her prior use of the emission factors in this report on behalf of Unocal.

¹⁰⁸ Applicant Opening Brief, pp. 15-16.

¹⁰⁹ Applicant Opening Brief, p. 15.

emissions, which she reduced to account for the mitigation effect of watering.

On the very page cited by the Applicant, Dr. Fox testified,

DR. FOX: The applicant's revised construction emission estimates include two Caterpillar model 623 scrapers. And the data in this table under the 20 cubic yard column corresponds to emission factors for the Caterpillar 623 scraper which will be used in this case.

If you look down at the bottom, the geometric mean is 45 pounds per scraper hour. And *that's an uncontrolled emission factor*.¹¹⁰

Applicant acknowledges that its presentation of new testimony in its brief is improper,¹¹¹ and for good reason. Its new testimony is flat wrong on its face and contradicted by the record. Again, Applicant's brief does nothing to change the fact that Dr. Fox's testimony is supported by substantial evidence.

Thus, the Commission is constrained to find that there is substantial evidence to support a fair argument that emissions from scraper drop operations will be large enough by themselves to make the 24 hour and annual PM₁₀ emissions impacts significant, and much more severe than estimated by the Applicant.¹¹²

2. Silt content was underestimated

After CURE identified the errors in the Applicant's estimated silt content, the Applicant conducted a flurry of new analyses, some of which were only presented for the first time on the last day of hearings. CURE

¹¹⁰ Tr. 8/31/04, p. 161.

¹¹¹ Applicant Opening Brief, p. 16.

¹¹² Correcting only the emission factor for scraper drop operations increases PM₁₀ emissions from 42 lbs/day to 101 lbs/day. Tr. 8/31/04, pp. 173-174

witnesses accepted the results of all of those analyses for the full scope of the material analyzed. CURE's witness readily acknowledged that a sieve analysis is more accurate than a visual inspection.¹¹³

The only remaining dispute is the silt content of the uppermost 1 foot of soil. Staff claims that Mr. Baldwin's and Dr. Fox's silt testimony is based on the "erroneous assumption" that the new sieve analyses did not include the upper 1 foot of fill soil.¹¹⁴ However, this is incorrect. Both repeatedly testified that there were no sieve analyses for the top 1 foot of fill. In fact, the Applicant's witness had to admit, when pressed, that he was "guessing" as to the inclusion of the top 1 foot in the composite samples.¹¹⁵ Guessing is not fact, but rather speculation, and is not sufficient to overcome the substantial evidence presented by CURE's witnesses.

This is an important distinction because construction emissions primarily arise from disturbing a column of soil. A weighted average silt content is required to estimate PM₁₀ emissions that considers all three types of material at the site – soil, fill, and bedrock – and the volume of each that is disturbed.¹¹⁶ Dr. Fox used a weighted average of silt content to estimate emissions. She relied on the visual estimates of silt content only for the top 1 foot of fill/soil because the Applicant did not present any sieve analyses of the 1 foot. Dr. Fox's estimate of silt content for this upper 1 foot was adjusted

¹¹³ Tr. 8/31/04, pp. 167-168

¹¹⁴ Staff Opening Brief, p. 15.

¹¹⁵ Tr. 8/31/04, p. 225.

¹¹⁶ Tr. 8/31/04, p. 201.

downward to account for Applicant geologist's admitted error.¹¹⁷ Visual estimates are reliable,¹¹⁸ particularly when adjusted downward to accept the correlation between the visual observations by the Applicant's geologist and his sieve analyses.¹¹⁹ She demonstrated that the Applicant's estimate of 42 lbs/day PM₁₀ was understated by 18 lbs/day.¹²⁰

Regardless, the argument over silt content is much ado about not very much. Dr. Fox revised the PM₁₀ analyses using all of the Applicant's new silt data. The revised analyses indicated that PM₁₀ emissions were reduced from her original estimate of 119 lb/day to 101 lb/day, compared to 42 lb/day estimated by the Applicant.¹²¹

3. Watering control efficiency was overestimated

The experts disagree on how much the watering of the site will mitigate emissions. Applicants and Staff defend their use of the maximum possible control efficiency – 85%. CURE's witness testified that this extreme level of control is unlikely to be achieved, even with an onsite mitigation monitor.¹²² Applicant's offered to use a second watering truck, effectively conceding that one truck alone is inadequate. However, if it takes two trucks to control fugitive dust rather than one, emissions from watering trucks themselves will be greater than Applicant's estimated.

¹¹⁷ Tr. 8/31/04, p. 167.

¹¹⁸ Tr. 8/30/04, pp. 98-99.

¹¹⁹ Tr. 8/30/04, p. 102; Tr. 8/31/04, p. 167.

¹²⁰ Tr. 8/31/04, p. 173.

¹²¹ Tr. 8/31/04, p. 268.

¹²² CURE Opening Brief, p. 44; Tr. 8/31/04, pp. 169-170.

Thus, there is substantial evidence that emissions were underestimated, either because watering will not be 85% effective, or truck emissions will be more than estimated.

Nevertheless, Dr. Fox did not adjust her estimate of emissions to use a lower watering control efficiency.¹²³ This merely demonstrates yet again that the Applicant's estimated emissions were not conservative.

VII. THE PROJECT WILL HAVE SIGNIFICANT OPERATIONAL IMPACTS

A. PM₁₀ Emissions From Operation Will Be Significant

Based on her research on the precise type of turbines that will be employed by Project, Dr. Fox estimates PM₁₀ emissions at a minimum of 3.1 lbs/hour (but likely higher).¹²⁴ Using the very conservative emission rate of 3.1 lbs/hour and including emissions from the cooling tower and ZLD filtercake handling,¹²⁵ Dr. Fox explained that the Project's operational emissions will exceed SCAQMD's CEQA threshold of 150 lbs/day for PM₁₀.¹²⁶ In making this estimate, Dr. Fox relied on the results of source tests for the same model of turbine combusting the fuel of the same sulfur content proposed by the Project.¹²⁷

¹²³ Tr. 8/31/04, p. 174.

¹²⁴ Tr. 8/31/04, pp. 297-298. In her written testimony, Dr. Fox explained that 3.2 lbs/hour is a reasonable estimate of PM₁₀ emissions per turbine per hour.

¹²⁵ Dr. Fox's PM₁₀ emission estimate includes cooling tower emissions and ZLD filtercake handling emissions as estimated in Table 13 of the FIS.

¹²⁶ Tr. 8/31/04, p. 298.

¹²⁷ Tr. 8/31/04, pp. 298-301.

In response to this actual emissions data from real-world operating circumstances which are similar to that of the Project, Staff writes that majority of source tests prove that PM₁₀ emissions “will most likely” fall under 3.0 lbs/hr of PM₁₀.¹²⁸ This statement plainly supports a fair argument that there is ***a possibility*** that emissions from the turbine may exceed 3.0 lbs/hour. Again, the fair argument standard under CEQA does not ask whether the impact is “likely” or “probable,” but simply whether that impact is ***possible***. For purposes of CEQA, “[possible] indicates that something is realizable as an end. It can imply either a moderate degree of probability ***or the barest chance within the limits of circumstances.***” (*Security Environmental Systems v. South Coast Air Quality Management District*, (1991) 229 Cal.App. 3d 110, 119 (emphasis added).)

Staff next argues that General Electric, the turbine manufacturer, guarantees an emission rate of 3.0 lbs/hour. As Dr. Fox explained in her oral testimony, and as is evident from the face of that guarantee, it only applies at 100 degrees Fahrenheit and under other limited circumstances.¹²⁹ The average temperature of the Project site is 72 degrees Fahrenheit, well below the limiting condition contained in the G.E. guarantee. Staff and the Applicant now cite to a letter from the ***sales department*** of G.E. claiming that the guarantee applies at any temperature. Of course, that document has

¹²⁸ Staff Opening Brief, p. 21.

¹²⁹ Tr. 8/31/04, p. 297.

limited evidentiary value since it is not an official company guarantee or technical document from a reliable source.

Staff next cites to ***extra-record*** evidence from AP-42 to challenge Dr. Fox's testimony that the EPA's AP-42 emission factors do not distinguish between newly manufactured LM6000 turbines and older LM6000 turbines.¹³⁰ CURE respectfully requests the Commission to strike this portion of Staff brief (p.24). In the alternative, if the Commission invites Staff to formally introduce this new extra-record evidence into the record, CURE requests that such introduction be through a sworn witness who is subject to cross-examination, consistent with the Commission's standard evidentiary procedure. In any event, this point does not detract from Dr. Fox's testimony, based on actual source test data, that the PM₁₀ emissions from the turbines may exceed 3.0 lbs/hr.

B. The Applicant's Proposed Mitigation For PM₁₀ Emissions From Operation Is Ineffective

Although the Applicant proposes to generate mobile source emission reduction credits by retrofitting heavy-duty fleet vehicles such as garbage trucks and school buses to offset the Project's operational PM₁₀ emissions, this mitigation measure will be is not legally adequate to enable the Commission to conclude that the Applicant will necessarily reduce impacts to a level of insignificance. Specifically, school buses and the Project will not operate at the same time. And, because mobile sources spread their pollution

¹³⁰ Tr. 8/31/04, p. 303; Staff Opening Brief, p. 24.

over a broad area while the Project will concentrate its PM₁₀ pollution locally, the Commission has no basis to conclude that this measure will effectively mitigate the actual impacts. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).)

Staff attempts to dismiss this concern by reversing its previous position on this issue in other cases and by incorrectly stating that the Commission has never before found localized mitigation necessary for a project's PM₁₀ impacts on regional air quality.¹³¹ In fact, there are a number of cases where the Commission has required localized mitigation for PM₁₀ pollution, based on ***Staff's*** recommendation. For example, in the Three Mountain Power case, staff found that the "project's impacts will contribute to the PM₁₀ violations" of the ambient air quality standard.¹³² To mitigate these impacts, Staff recommended the project mitigate PM₁₀ emissions by emission reductions in the local area.¹³³

The Commission also required local offsets to mitigate the project's contribution to the region's violation of the PM₁₀ ambient air quality standard in the Pico Power Plant Project. In recognizing the local air quality and public health impacts of PM₁₀, the Commission decided as follows:

¹³¹ Staff Opening Brief, p. 27.

¹³² Commission Decision, 99-AFC-2, p. 121.

¹³³ *Id.* at p. 122.

Under the proposed retrofit/replacement program, financial incentives will be provided to encourage residents within a 15-mile and 25-mile radius of the project to replace existing wood stoves with gas stoves and EPA-certified solid fuel devices or to retrofit existing wood-burning fireplaces to gas fireplaces. The Applicant will provide the BAAQMD with a grant, based on a maximum of \$1,250 for each retrofit/replacement, in order to fund this program. (Ex. 40, p. 3.1 -7). This plan is similar to the one proposed for the Los Esteros Critical Energy Facility and for the Russell City Energy Center. The proposed mitigation package will provide reductions in emissions of directly emitted PM₁₀, PM₁₀ precursors, and other pollutants that will mitigate both the ambient air quality and the public health impacts of the PM₁₀ emissions from the [Pico Power Plant] project. (Ex. 36, p. 3.1-28).¹³⁴

In the Los Medanos case, “in response to public comments, Staff added a condition to require [the applicant] to use the local emission reduction credits (ERCs) generated in Antioch before non-local offsets may be used” as mitigation for the project’s PM₁₀ emissions.¹³⁵

Here, without a specifically defined program to provide offsets that match the local impacts of the Project, there is no basis for the Commission to conclude that the PM₁₀ impacts from the Projects will be insignificant.

C. The Applicant’s Failure to Provide Federally-Approved Offsets Is a Significant Impact Under CEQA

There is no dispute that if PM₁₀ emissions exceed 4 tons per year, SCAQMD rules require the Applicant to provide Emission Reduction Credits. The Applicant will provide ERCs for NO_x emissions, but not for PM₁₀ emissions. This ERC requirement is part of California’s State Implementation Plan, approved by the US EPA, making it a federal

¹³⁴ Commission Decision, 02-AFC-3, p. 77.

¹³⁵ Commission Decision, 99-AFC-1, p. 100.

requirement. Failure to provide the required ERCs when emissions exceed 4 tons per year would be a significant impact because the Project would “[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project ... adopted for the purpose of avoiding or mitigating an environmental effect.” (CEQA Guidelines Appendix G, § IX(b).)

As we explained in our Opening Brief, SCAQMD rules require calculating PM₁₀ emissions for purposes of this 4 ton-per-year threshold on a monthly basis, not on an annual average. Based on this mandated methodology, the Project has the “potential to emit” more than 4 tons-per-year of both PM₁₀ and VOCs.

Presumably, in its reply brief, staff will claim that SCAQMD has found that the Project will not trigger the 4 ton-per-year threshold by pointing to a letter from Pang Mueller, Senior Manager at SCAQMD, dated July 23, 2004. In that letter, Ms. Mueller claims that “based on the proposed *monthly* and annual hours of operation” the Project’s “potential to emit” PM₁₀ and VOCs will not exceed 4 tons per year threshold in SCAQMD Rule 1304. This statement demonstrates a misunderstanding of the facts of this case. The record contains no evidence that the Project has *any* limit on monthly hours of operation whatsoever. Indeed, neither the Applicant nor the Staff has made any suggestion that there would be a monthly limit on operation of the Project, making the SCAQMD’s letter irrelevant.

As we also explained in our Opening Brief, the mobile source credits offered by the Applicant as mitigation for the Project will not be generated under a federally-approved program and therefore cannot be used to satisfy SCAQMD's federally-approved offset requirement in Rule 1303. (*General Motors v. United States*, (1990) 496 U.S. 530, 533-34.)

In sum, because the Applicant has not provided federally-approved Emission Reduction Credits to offset its potential to emit PM₁₀ and VOCs from operation, the Project will conflict with “a regulation of a agency adopted for the purpose of mitigating an environmental effect,” a significant impact under CEQA. (CEQA Guidelines Appendix G, § IX(b).)

D. The Project Will Emit Significant Amounts of Carbon Monoxide

The maximum daily carbon monoxide emissions from the project are 721.10 lbs/day.¹³⁶ The SCAQMD significance threshold for CO is 550 lbs/day, including both direct and indirect emissions.¹³⁷ According to Dr. Fox's expert opinion, exceeding this threshold is a significant impact.¹³⁸ This establishes a fair argument that the Project's CO emissions are a significant air quality impact.

Staff does not dispute the facts on which Dr. Fox based her assessment, but instead states that, using other criteria, it finds no

¹³⁶ Ex. 12, AQ Table 16.

¹³⁷ SCAQMD CEQA Handbook 4/93, p. 6-2; Attachment H to Ex. 25.

¹³⁸ Ex. 25.

significant impact.¹³⁹ As articulated by the Commission itself, other substantial evidence suggesting a different conclusion does not defeat a fair argument, once established.¹⁴⁰ To the contrary, it supports the need for an EIR that resolves these important issues.

VIII. CUMULATIVE IMPACTS WILL BE SIGNIFICANT

Dr. Fox opined that the capital improvement project at the wastewater treatment facility immediately adjacent to the Project site will result in significant cumulative impacts.¹⁴¹ In response, the Staff does not claim (let alone support with substantial evidence) that there is no possibility of significant impacts from combined effect of these projects. Instead, Staff writes that it simply disagrees with Dr. Fox.¹⁴² Again, this disagreement does not overcome the fair argument.

¹³⁹ Staff Opening Brief, pp. 28-29.

¹⁴⁰ Modesto Irrigation District Electric Generating Station Small Power Plant Exemption Decision And Mitigated Negative Declaration, 03-SPPE-1, February 2004, pp. 6-7.

¹⁴¹ Ex. 25, pp. 40-42.

¹⁴² Staff Opening Brief, p. 31.

IX. CONCLUSION

CURE has presented substantial evidence supporting a fair argument that the Project may result in numerous significant impacts. The Commission must, therefore, deny the Application for a Small Power Plant Exemption.

Date: October 4, 2004

Respectfully submitted,

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PROOF OF SERVICE

I, Lionel Brazil, declare that on October 4, 2004, I deposited copies of the attached

REPLY BRIEF OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY

in the United States mail at South San Francisco, California, with first class postage thereon fully prepaid and addressed to the following:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, California, on October 4, 2004.

Lionel Brazil